BEFORE

THE PUBLIC SERVICE COMMISSION OF

SOUTH CAROLINA

DOCKET NO. 2001-485-W/S - ORDER NO. 2003-214

APRIL 15, 2003

IN RE: Rule to Show Cause on Submeterers	)	ORDER DENYING AND
	)	DISMISSING RULES TO
	)	SHOW CAUSE AND
	)	VACATING ORDER

I. INTRODUCTION

This matter comes before the Public Service Commission of South Carolina (the Commission) on the November 27, 2001 and November 28, 2001 Petitions for Rule to Show Cause filed by the Commission Staff (the Staff). The original Petition requested an issuance of a Rule to Show Cause to Aquameter, Inc. a/k/a Viterra Energy Services Group (Viterra) and Quail Hollow Apartments (the Apartments) as to why these entities should not be required to seek Certificates of Public Convenience and Necessity as "public utilities" under S.C. Code Ann. Section 58-5-10(3) (Supp. 2000). The Petition noted that through Order No. 1999-307, dated May 4, 1999, in Docket No. 98-624-E/W/S, the Commission has held that submetering entities are "public utilities" under S.C. Code Ann. Section 58-5-10 (Supp. 2000). Other Staff Petitions asked for similar relief in the way of a Rule to Show Cause against Utility Submetering Services, Inc., Tristar Management, USI a/k/a Easlan Capital, National Water & Power, Inc. (NW&P), and Water Systems, Inc. The Respondents Utility Submetering Services, Inc. and USI a/k/a Easlan Capital were subsequently dismissed as Respondents by this Commission's

Orders. The National Submetering and Utility Allocation Association (NSUAA) and the Consumer Advocate for the State of South Carolina (the Consumer Advocate) subsequently joined the proceedings as Intervenors.

After receiving an extension in which to answer the Staff Petition, certain party respondents did respond, denying that they should be regulated as "public utilities." We granted the Staff's Petitions, and, except with regard to Utility Submetering Services, Inc. and USI a/k/a Easlan Capital, we set the matter for a hearing on all the remaining Rules to Show Cause.

Accordingly, a hearing was held on May 30, 2002 at 2:30 PM in the offices of the Commission, with the Honorable William Saunders, Chairman, presiding. The Commission Staff was represented by F. David Butler, General Counsel. NSUAA was represented by John F. Beach, Esq., Viterra Energy Services Group and Aquameter, Inc. were represented by John J. Pringle, Jr., Esquire. National Water & Power, Inc. was represented by John F. Beach, Esquire. The Consumer Advocate was represented by Elliott F. Elam, Jr., Esquire. Not present were Quail Hollow Apartments and Tristar Management. Although a representative of Water Systems, Inc. was present, no legal representative was present. Therefore, Water Systems, Inc. did not participate in the proceedings as an entity.

The Commission Staff presented the testimony of William P. Blume, William O. Richardson, Jocelyn G. Boyd, all of the Commission Staff, and David Price of the South Carolina Department of Health and Environmental Control (DHEC). NSUAA presented the testimony of Edwin W. Harley, Milt Brown, and Thomas Arthur Spangler. Viterra

Energy Services Group and Aquameter, Inc. presented the testimony of Marc Treitler. NW&P presented the testimony of William R. Griffin. Further, various members of the public were heard on this matter, many of whom were connected with the apartment and/or real estate businesses.

II. DISCUSSION OF TESTIMONY

The Commission Staff first presented the testimony of William P. Blume, Manager of the Commission's Audit Department. Blume explained the possible accounting impact on companies that are designated as a submeterer of water if such companies are determined to be a utility by the Commission. Although Order No. 1999-307 found that a submetering company would be a utility, and thus subject to the rules and regulations of the Commission, Order No. 2000-436 held this finding in abeyance. Blume noted that if, however, submeterers were found to be public utilities, then certain accounting guidelines and procedures could be required of the submetering company.

First, Blume testified that, if found to be a utility, a submetering company could be required to make use of the water and wastewater chart of accounts as published by the National Association of Regulatory Utility Commissioners (NARUC). Such chart of accounts is designed for companies dealing in water and wastewater service. These accounts are specialized, and do not fall under the normal chart of accounts that most companies would be using in their day to day accounting operations, according to Blume. Blume further states that regulatory bodies require the use of the chart of accounts published by NARUC in order that there will be a consistency among companies in the utility business. Common charts of accounts make it possible to

compare one company with another. Blume notes that if the Commission rules that a submetering company is a regulated utility, such companies could fall under the requirement for use of the NARUC chart of accounts. Blume testified that there will be some cost in setting up and implementing a new chart of accounts, such as the cost of training employees.

Although Blume stated a belief that the Commission could rule that some other type of chart of accounts could be used, he also stated that a common chart of accounts would be required, so that comparisons could be made. Blume also commented on other regulatory requirements that submeterers would be subject to if the Commission ruled that they were regulated utilities.

William O. Richardson, at that time Acting Chief of the Commission's Water and Wastewater area, also testified. Richardson provided the Commission with the results of a survey done under his supervision addressing regulation of submetering in other states. Further, Richardson discusses possible avenues that can be pursued by a tenant related to billing disputes with submeterers. Richardson noted that North Carolina was the only state that responded to the survey that regulates submeterers as if they were public utilities. Florida, New York, and Pennsylvania do not regulate submeterers as public utilities, but submeterers can charge no more than if billed by the utility. Richardson also testified that Georgia does not regulate submeterers, since it does not regulate water or wastewater companies. According to Richardson, some of the responding agencies reported that since submeterers did not take possession of the water, they could not resell it, and that the submeterers were not therefore regulated.

Jocelyn G. Boyd, Staff Counsel for the Commission, also testified. Ms. Boyd testified as to the results of her research regarding a landlord's ability to disconnect a tenant's water and sewer services for non-payment. Ms. Boyd stated that the words submetering and submeterer were not mentioned in the Residential Landlord and Tenant Act, which governs landlord's and tenant's rights. Ms. Boyd stated that her belief was that S.C. Code Ann. Section 27-40-440 requires the landlord to make available running water and reasonable amounts of hot water at all times translates into the landlord not being able to disconnect a tenant for nonpayment of water services. This could produce an inconsistency in the applicability of the Commission's regulations that would allow utility companies to disconnect customers for non-payment for services, according to Ms. Boyd. Ms. Boyd concluded that, because of this inconsistency, it appears that the Commission is unable to regulate submeterers as public utilities by giving submeterers the authority to disconnect a tenant's water or wastewater service for non-payment. Ms. Boyd noted that the General Assembly could enact legislation that would allow the Commission to regulate submeterers.

NSUAA presented the testimony of Edwin W. Harley, its President. Harley testified that his Company operates a utility billing program at two of the apartment units that it owns in South Carolina. Harley noted that his Company operated the billing service on a not-for-profit, pass-through basis. Harley states that his Company is not a utility, but is an apartment owner who passes through utility costs to its residents. Harley notes that his company does not have the same characteristics as a utility, in that it has no monopoly over any service area, it does not own a large, capital intensive utility

infrastructure, nor does his company seek a guaranteed rate of return on its investment, nor on its service. Harley outlined several mechanisms in place that allow a resident to express its complaints and get relief. The billing department's customer service department resolves many complaints, according to Harley, and his company's property management staff solves complaints as well, according to him. Further Harley noted that if a tenant's complaints are not resolved at either one of these two levels, the tenant can consider filing an action under the South Carolina Residential Landlord and Tenant Act, filing an action pursuant to contract law, enlisting the assistance of the state or local Department of Consumer Affairs, or bringing a claim in magistrate's court. Harley expressed the opinion that these mechanisms provide adequate protection for residents. Harley further testified that if this Commission regulated his industry, that the result would be an end to the expansion of these billing programs, which he characterized as improving water conservation.

Milt Brown also testified for NSUAA. Brown was Acting Climatologist for the South Carolina State Climatology Office. Brown opined that the State was still in a drought condition, and that conservation measures were needed.

Finally, NSUAA presented the testimony of Thomas Arthur Spangler, a Vice-President of United Dominion Realty Trust in Richmond, Virginia. Spangler oversees utility billing programs for his company. Spangler noted that his company operates 1,572 units at 6 different properties in South Carolina. The billing service is done on a not-for-profit, pass-through basis in the company's properties, according to Spangler. Spangler echoed the sentiments of company witness Harley, by stating that his billing system is not

a utility and that there are several mechanisms in place wherein a consumer could successfully complain.

Marc Treitler, Viterra's General Counsel, also testified. According to Treitler, no state in the U.S. classifies a landlord using submetering as a "public utility," and only a handful of states have any participation in landlord-tenant utility billing practices. Treitler stated that his company's practices are not regulated in the majority of states. Finally, Treitler discussed the implications that he thought declaring submeterers to be public utilities would have on the billing companies.

Lastly, William R. Griffin, Vice-President and General Counsel of National Water & Power (NW&P), testified. Griffin noted that through written comments, NSUAA requested that the Commission re-visit its 1999 decision to regulate the industry. Further, it was urged that if the industry was to remain regulated, that the Certificate of Public Convenience and Necessity was not the proper mechanism for said regulation. Griffin noted that the public will be protected whether the Commission exerts jurisdiction over the industry or not. Griffin cited similar remedies to those cited by witness Harley. Further, Griffin noted that his industry did not have the characteristics of a utility. Griffin noted that the members of NSUAA do not want or need a guaranteed rate of return. The billing service companies have been established to earn fees in a competitive environment, according to Griffin. Billing service providers compete for the billing business at apartment properties, thus keeping the amount of fees in check, according to Griffin. Griffin also notes some other non-utility characteristics such as lack of desire by

the billing companies for a franchise area, lack of need for the Commission approval of rates, and the services' not-for-profit operating basis.

Griffin also testified to the fact that assumption of jurisdiction over submeterers as "public utilities" would increase Staff workload in that large numbers of new "public utilities" would be created, increasing the workload on the Commission Staff, and that the billing of apartment properties involves a small amount of money. Further, Griffin expressed a concern that regulation by the Commission will discourage water conservation programs.

Griffin testified that submeterers who are members of NSUAA are not providing water and sewer service "for compensation," in that they only provide water and sewer service on a "pass through" basis. Through submetering, Griffin contends that the landlord is only capturing a portion of its monthly costs for water and sewer service. According to Griffin, NSUAA property owners never mark up or profit from the submetering of their tenants. Griffin states a belief that this Commission has tacitly accepted this position in prior proceedings. For example, in Docket No. 2001-35-W/S, Complaint of Residents of Colonial Villa Apartments, Griffin notes that the residents sought through a formal complaint to have Colonial Villa Apartments designated as a public utility under S.C. Code Ann. Section 58-5-10(3). In its February 2001 response to the complaint, Colonial Villa asserted that it was not subject to the Commission's jurisdiction because it was not acting as a "public utility." Colonial Villa set forth the same reasons that NSUAA has set forth, and requested that the Complaint be dismissed. Griffin notes that the Commission refrained from further pursuing the Colonial Villa

matter, and did not grant the resident's request to regulate Colonial Villa's billing activities as a public utility.

Witness Griffin discussed several policy reasons which he says dictate that the Commission should not use the Public Convenience and Necessity mechanism to regulate the industry. First, compliance with the specialized "regulatory" accounting system presents a major concern, according to Griffin, since none of the billing service providers or property owners in the United States use that accounting system. Further, Griffin states that the property owners may not be able to obtain bonds. Griffin also cited certain legal reasons why the Commission should not use the Certificate of Public Convenience and Necessity to regulate submeterers. Griffin believes that such regulation works to the detriment of tenants. For example, if the Commission was required to set rates for these companies, a fair rate of return would be required. In addition the rates would have to include, according to Griffin, the company's cost of pursuing its rate applications, the costs associated with implementing and maintaining a separate regulatory accounting system for the submetering service, the costs of maintaining water and sewer pipes within an apartment complex, costs associated with obtaining the bonds required of water and sewer utilities, and the costs of participating in this proceeding. In short, Griffin urges this Commission to deny the Staff's Petition and rule that it will not regulate submetering companies as property owners engaged in submetering, as public utilities.

III. FINDINGS, CONCLUSIONS, AND ORDER

1. S.C. Code Ann. Section 58-5-10 (3) (Supp. 2002) defines "public utility" as an entity or person (1) furnishing or supplying water, sewerage collection, and sewerage disposal to the public (2) for compensation.

2. A preponderance of the evidence in this matter demonstrates that submeterers of water and wastewater services do not meet the statutory definition of a "public utility," and should not therefore be regulated by this Commission as jurisdictional utilities, in that such submeterers do not actually "furnish or supply" the commodity, but merely measure the amount of flow of water or wastewater and provide billing functions. See testimony of Staff witness Richardson, wherein he stated that other states do not regulate submeterers because they do not "take possession of the water." Tr., Richardson, at 87. See also Tr., Harley, at 138, wherein he stated that his company is simply an apartment owner who passes through utility costs to his residents. This proposition is echoed by NSUAA witness Spangler. Tr., Spangler, at 169.

3. These activities of measuring the commodity and providing billing functions do not make submeterers "public utilities" for purposes of regulation by this Commission.

4. Since submeterers of water and wastewater do not meet the definition of a "public utility" under our statutes, this Commission does hereby deny and dismiss the Rules to Show Cause issued by us. Further, and following this conclusion, we hereby vacate Order No. 1999-307 in which this Commission ordered a rulemaking to determine specific requirements for certification and regulation of submeterers.

5. This Order shall remain in full force and effect until further Order of the Commission.

BY ORDER OF THE COMMISSION:

Mignon L. Clyburn, Chairman

ATTEST:

Gary E. Walsh, Executive Director

(SEAL)